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No. 85-623

(3)

In The
Supreme Court of the United States
October Term, 1985

DALLAS COUNTY, TEXAS, et al.,
Petitioners,

v.

STEPHEN C. CRANE,
on behalf of
himself and others similarly situated,
Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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1. Respondents have made no attempt to show that the Questions Presented are not important and substantial federal questions, and for the reasons stated in the petition the questions are substantial.[1]

2. The Attorney General of the State of Texas has completely reversed his legal argument in this case and now claims that the County is following its own policy as set by what he claims to be a county officer, the District Attorney.[2]

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1. Respondents' briefs in opposition primarily and at length address the merits, not the reasons for granting the writ. Petitioners will address the merits (and respondents' arguments) in full at an appropriate time if review is granted by this Court.

2. The State of Texas filed a "Memorandum Opposing Preliminary Injunction" in this very case in which it claimed:

IV.

Articles 23.01 And 23.04 Of The Texas Code Of Criminal Procedure Are Constitutional.

The constitutionality of the Texas procedure authorizing issuance of a capias in a misdemeanor case has been upheld by

3. Both the State and Crane contend in their opposition that the County is not entitled to Eleventh Amendment immunity and is bound by the action of the District Attorney, notwithstanding the decisions holding the District Attorney is a State officer, even if there is no County policy.[3] They rely on the general rule that counties are not entitled to Eleventh Amendment immunity but overlook the exception to that rule as set forth in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct.900 (1984), which overruled liability against the County since funding for the county mental retardation programs comes almost entirely from the State which cooperates with the County to operate the mental retardation programs. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Eleventh Amendment barred a suit against state and county officials for retroactive award of welfare benefits. Texas counties, as has been pointed out in our Petition, are unique in that all

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the Fifth Circuit against claims that such procedure was violative of due process. *Smart v. Jones*, 530 F.2d 64 (5th Cir. 1976), cert. denied 429 U.S. 887. *See also*, Tex.Att.Gen.Op. No. C-666 (1966).

The Texas Court of Criminal Appeals has correctly distinguished between the issuance of a capias in a misdemeanor case, which is a ministerial act, and the establishment of probable cause for continued detention. *See Ex parte Garcia*, 547 S.W.2d 271 (Tex.Crim.App. 1977).

The Fourth Amendment requires a judicial determination of probable cause in order to justify extended restraint following arrest. *Gerstein v. Pugh*, 420 U.S. 103 (1975). *See also, Bell v. Wolfish*, 441 U.S. 520 (1979). However, it is submitted that a different standard obtains where a capias is issued, as in the case at bar, for the purpose of initiating prosecution only. The legality of extended detention following arrest may be challenged by writ of habeas corpus, whereupon it then becomes incumbent upon the state to establish sufficient probable cause to justify continued restraint of liberty. *Supra.* In the case at bar, there was no extended restraint of Plaintiff within the meaning of *Gerstein v. Pugh, supra.*"

The Attorney General then prayed that all relief requested by the Plaintiff be denied. (R. 118).

3. For discussion of Texas counties and Eleventh Amendment immunity, see *Doe v. Sullivan*, 472 F.Supp. 975 (W.D.Tex 1979).

property in the hands of the County belongs to the State itself subject to absolute control and disposition of the Texas Legislature. *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915 (1925).

Respondents mistakenly believe that a State Agency must cover the entire geographical area of the State. Nothing could be farther from Texas law. Many State Agencies cover only a portion of the State.[4]

Curiously enough, the State takes the unusual position that "the District Attorney is accountable not to the State of Texas but only to the county residents who vote to re-elect or oust him, Texas Constitution Art. 1, Sec. 18, or who can institute an action to remove him. Tex.Rev.Civ. Stat.Ann. art. 5976." This position is just as unusual as that of the State of Texas changing positions since Texas Constitution Art. 1, Sec. 18, provides that "No person shall ever be imprisoned for debt." The State Attorney General apparently follows the tactic of citing some authority, even if it is not on the subject.

Article 5976 relied on by the State Attorney General is equally inapplicable to the District Attorney since that is not the statute pursuant to which the District Attorney may be removed.[5]

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4. Water Conservation and Reclamation Districts created pursuant to Art. 16, §59, of the Texas Constitution which provides that such districts "may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the Constitution, which districts shall be governmental agencies . . ."

5. Art. 5976, V.A.T.S., provides:

"The proceedings for the removal of said officers may be commenced, either in term time or vacation, by first filing a petition in the district court of the county where the officer resided, by a citizen of the State who has resided for six months in the said county where he proposes to file such petition, and who is not himself at the time under indictment in said county."

The District Attorney may be removed from office pursuant to Tex.Rev.Civ.Stat.Ann. art. 332d by the "Prosecutor Council", as defined therein, composed of four citizens of the State of Texas who are not licensed to practice law, appointed by the Governor of the State of Texas, and with the advice and consent of the Senate, together with five incumbent elected prosecuting attorneys to be elected by prosecuting attorneys, at least one each of whom shall be a county attorney, a district attorney, and a criminal district attorney. The Supreme Court of Texas is to promulgate rules for electing prosecutors to the council. The council, by a majority vote, may cause to be filed in district court of the county in which the prosecuting attorney resides, a petition for removal, which petition is to be filed in the name of the State of Texas.

4. Respondent Crane's brief emphasizes the need for the granting of a writ because of a substantial and important question by stating that: "The Supreme Court in *Imbler v. Pachtman, supra,* expressly refused to reach the question of whether investigative or administrative duties of a prosecutor are shielded by absolute immunity, noting that several lower federal court decisions had held they are not." The Respondents overlooked the fact that filing an information with the County Clerk is, in fact, initiating a criminal prosecution which gives the prosecutor absolute immunity. *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

5. Respondents continue to ignore *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854 (1975), insofar as this Court provided options for the States, one of which is that the Fourth Amendment requires a judicial determination of probable cause in a misdemeanor case as a prerequisite to an extended restraint of liberty following arrest and that it may be desirable to make the probable cause determination at the suspect's first appearance before a judicial officer. The Texas policy, which was approved by the Attorney General of Texas and only followed by Dallas County, follows exactly that option. Neither the Texas Attorney General nor

Respondent Crane cited any authority to show that the District Attorney was a county officer, except that Respondent Crane quoted at length from the Fifth Circuit opinion. This is understandable since there has never been a suggestion by a court that the District Attorney was a county official and the Texas Attorney General has ruled that a Criminal District Attorney is a district officer rather than a county officer. See Opinion H-656, Appendix L in Petition for Writ of Certiorari. Certainly if the District Attorney is a State officer, his actions are actions of the State and not the County. Therefore, as the District Court held, the County is not liable for the acts of an official over whom it has no control. See *Monell v. Department of Social Services*, 436 U.S. 658; *Carbalan v. Vaughn*, 760 F.2d 662 (5th Cir. 1985, cert. pending).

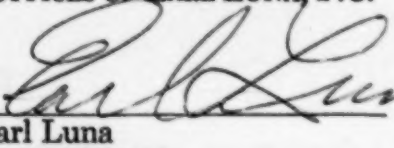
The failure of the Respondents to demonstrate that the questions are not substantial adds weight to Petitioners' reasons for granting the writ as set out in the Petition for Writ of Certiorari.

PRAYER

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

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PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for the State of Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 2nd day of December, 1985, I served copies of the foregoing Petitioners' Brief in Reply to Respondents' Briefs in Opposition by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the courts below, at the address indicated, to-wit: Mr. Douglas Larson, Johnston & Larson, Elmbrook Gardens Office Building, 8204 Elmbrook Drive, Suite 330, Dallas, Texas 75247; Mr. Peter A. Lesser, Mockingbird Towers, Suite 704-E, 1341 W. Mockingbird Lane, Dallas, Texas 75247; Mr. Larry King, Assistant Attorney General, Supreme Court Building, P. O. Box 12548, Austin, Texas 78711; and Mr. Peter Harlan, Assistant District Attorney, 9th Floor, Dallas County Courthouse, Dallas, Texas 75202.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said Earl Luna, on this the 2nd day of December, 1985.

Betty Jarratt, Notary Public in
and for the State of Texas
My Commission Expires 11-30-88